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**Abstract**

This article concerns recognition and compensation of the intimate, gendered work of caring by family members for workers who became ill with lung diseases as a result of poor labour conditions in the mines in South Africa. It focuses on a recent decision by a court in South Africa (Nkala and Others v. Harmony Gold Mining Company Limited and Others, 2016) that took the unusual step of acknowledging this care work and attempting to compensate it indirectly. The article combines insights from political economy and law within a feminist frame to develop an argument about compensation for social reproductive work to address the harm experienced by the carers of mineworkers. Using the theory of depletion through social reproduction, it suggests ways of understanding the costs of care in order to fully compensate the harms suffered by the carers. This is done with reference to a photographic essay by Thom Pierce called 'The Price of Gold' taken in the mineworkers' homes after their discharge from work due to illness. The article argues that ideas of depletion should inform any consideration of compensation of people engaged in caring in a range of reparatory contexts

## Introduction

This article concerns recognition and compensation of the intimate, gendered and unremunerated work of caring, in this case for relatives of mine workers who became ill as a result of silicosis and Tuberculosis (TB) in South African gold mines. In its decision in *Nkala and Others v Harmony Gold Mining Company Limited and Others*, 2016, a court took the unusual step of acknowledging this care work and attempting to compensate it partially, albeit via the legal ‘backdoor’. The article combines insights from political economy and law within a feminist frame to develop an argument about compensation for social reproductive work to address the harm experienced by the carers of mineworkers. Using the theory of depletion through social reproduction (Rai, Hoskyns and Thomas, 2014), the article examines how we understand the costs of care in order to fully compensate the harms suffered by the carers. We do this by examining a series of photographs and accompanying descriptions by Thom Pierce called *The Price of Gold* taken in the mineworkers’ homes after their discharge from work due to illness.<sup>i</sup> In so doing, we tease out some of the complexities of the calculation of loss for economic and legal measurement that should inform any consideration of compensation of people engaged in caring for those who are injured or ill in a range of reparatory contexts. We link this discussion to feminist critiques of the law of damages that expose the way in which traditional legal categories ignore and exclude women’s unpaid work. By using a feminist approach that unpacks and acknowledges care in its many dimensions, we challenge the structural devaluation of intimate labour.

In May 2016 the South African High Court (Gauteng Local Division) granted an order in the case of *Nkala and Others v Harmony Gold Mining Company Limited and Others*, 2016 certifying a consolidated class action against 32 mining companies by mineworkers and their dependents who contracted silicosis and TB. The litigation that led to this decision began in 2012 with efforts dating back to 2009 by some of the lawyers involved in the case (Chisholm & Lépez, 2017; Ledwaba and Sadiki, 2016). The case concerns the contraction, since 1965, of silicosis, by miners breathing in silica dust generated during mining. The disease can take many years to manifest, is incurable, debilitating and often fatal. The mineworkers argued that exposure to silica dust also increases the risk of TB, a lung disease caused by bacterial infection. Once miners became too ill to work they returned to their families who became tasked with their care. The *Nkala* decision, a landmark judgment in the development of class action law in South Africa, authorises the commencement of the largest class action litigation ever to occur in the country, with almost half a million possible claimants (Chisholm & Lépez, 2017).<sup>ii</sup> The article focuses on the aspect of the decision that concerns the access of dependents of the miners to parts of the compensatory damages potentially arising from this claim. It then discusses the issue of unpaid care work by the families of the miners using the theory of depletion through social reproduction. It goes on to apply this theoretical frame in analysing some of the photographs taken by Thom Pierce to consider the complex and varied dimensions of harm suffered by the family members of the miners. Following this it looks at legal responses to compensation for unpaid care and how social reproduction and its depletion should be built into the law’s approach to remedying this harm whether through damages, reparations or other means.

## I The *Nkala* case

### *Background*

The case against the mines and their complicity in the illness and death of possibly hundreds of thousands of mine workers should be understood within the history of the symbiotic relationship

between mining capital and the colonial, post-colonial and apartheid states in South Africa over the past 130 years since gold was first discovered in the Witwatersrand.<sup>iii</sup> The state colluded with the mining industry to ensure its supply of cheap, Black labour and the mines funded the development of the Apartheid state (Wilson, 2014: 7). The migrant labour system was central to this collusion in providing a pool of cheap labour. Workers were legally prevented from living in areas close to the mines and were housed in poor conditions in mine compounds for part of the year. They returned to families for brief visits in the rural 'labour reserves' or 'Bantustans', racially designated areas with limited land, services or infrastructure, to which communities were removed coercively and lived in poverty. By removing Black people's access to their land and livelihood, they were effectively forced to become migrant labourers (Wilson, 2014: 9). Many mine workers also came from neighbouring countries, particularly Lesotho, Mozambique and Malawi (Wilson, 2014: 10). At its peak in the mid-1980s, half a million Black workers were employed in the mines (ibid). This has been declining steadily since then to around 120 000 workers in 2016 with the slowing of production (Ledwaba & Sadiki, 2016 quoting the Chamber of Mines: 145). When workers returned to their homes they encountered limited access to health care and social security (Wilson, 2014: 28-32). Family members, usually women, were left to provide the bulk of the care for these workers, on an unpaid basis. This caring work, which is deeply gendered, further entrenched women's poverty and inequality which was already severe in areas which supplied labour to the mines (Peacock, 2014: 6-9).

The litigation is significant in shining the spotlight on the historical legacy of a system of state and private sector complicity leading to structural violence against mineworkers and their families. The development of class action law in the judgment is not, however, the focus of our discussion. Of interest here is a less prominent feature of the court's decision dealing with the legal question of whether certain 'personal' claims for compensation are transmissible to the heirs of mineworkers who die before the claim officially commences. The next section will discuss this dimension of the *Nkala* judgment which has resulted in progressive development of the law in South Africa and a noteworthy finding on the issue of unpaid care work.

#### *Transmissibility of damages*

The South African law of delict (in other common law countries known as 'tort') allows for claims for damages for monetary loss caused by wrongful injuries to a person (such as loss of income and medical expenses) known as special damages. It also allows claims for wrongful injuries to a person's body leading to pain and suffering, loss of amenities of life and disfigurement that is not readily calculable (non-economic loss) but which can be given a monetary value by the courts as a form of compensation, known as general damages. The law has refused to allow general damages, as a claim arising only from the personal experience of suffering, from being transmitted to a person's estate. The dependents are, however, still able to claim loss of support and the estate can claim damage to property, while both can claim medical and funeral expenses (*Nkala*, at para 187). The exception to this, based on Roman Law, is that once *litis contestatio* (close of pleadings) has been reached the executor of the estate is allowed to effectively assume the role of the deceased and can pursue all pleaded claims, including those for general damages (at para 188). The reason behind this is that a claim made by a person before death is effectively 'frozen' once *litis contestatio* is reached and the executor is simply 'stepping into the shoes' of the deceased rather than bringing a claim in her/his 'own right' (at para 188). Mojapelo DJP and Vally J, the majority of a full bench of the provincial high court in the *Nkala* case, noted that reaching *litis contestatio* in Roman times was quite straightforward but under current South African court procedure is a much more complicated and uncertain issue (at para 189).<sup>iv</sup> Pleadings may appear to be closed but an amendment to pleadings at

a late stage can change this status, including if made by a defendant attempting to prolong close of pleadings or litigation as a whole.

The failure of the common law of damages to 'keep pace' with the changes to the law of procedure (at para 191) led the mineworkers to claim that the common law required development to avoid causing injustice or infringing South Africa's Bill of Rights. They asked the Court to develop the common law to allow all claims in the class action, including those for general damages, to be counted from the date of the launch of the certification application (at para 192). The Court accepted this challenge mindful of its obligation to ensure that the common law is responsive to changing social conditions and remains relevant and appropriate. This judicial role is accepted across common law systems. The additional dimension, in the South African context, is the existence of a constitutional mandate to the courts to develop the common law consistent with the 'spirit, purport and objects of the Bill of Rights' (*Constitution of the Republic of South Africa, 1996*, s8(3) and s39(2)). The mineworkers argued that by disallowing the transmission of the general damages claims to their estates, the law violated a number of their rights including to equality, dignity, life, access to the courts, and freedom and security of the person which includes a right to bodily integrity (at para 199). They claimed that their right to compensation, for damages suffered as a result of the mining companies' actions, should be able to benefit their dependents even if they do not survive the litigation process to benefit from it themselves. This implicated their right to equality since those who survive their illnesses for the duration of the action and their dependents would be in a better position than those who do not, the latter group suffering discrimination as a result (at para 204).

The Court found that there had been legislative developments in the United Kingdom, Australia and the United States to address the issue of damages for personal injury reaching the estates of people wrongfully injured who later died as a result (at paras 205-9). The Court also noted that since the first applications that preceded the class action a significant number of mineworker claimants had died and others might succumb before the matter was finalised. It thus found that failure to develop the law would result in a 'huge injustice' that would benefit the mining companies as a result of the 'very harm they caused the deceased class member' (at para 213). The Court noted that the harm resulting from the loss of the general damages would impact on the widows and children of the deceased mineworkers, 'the indigent, weak and vulnerable in our society' while benefiting 'powerful corporates' (at para 213). Significantly, the Court added the following point (at para 213):

It has to be borne in mind that while the mineworker experienced pain and suffering from the loss of amenities of life prior to his death, his widow and children too, bore some hardship by virtue of the care they were required to give to him as a result of his loss of amenities of life.

The gender bias inherent in the common law rule under consideration by the Court was raised by the *amici curiae* in this case. In prior proceedings two *amici curiae* were admitted to the certification case. These non-governmental organisations are the Treatment Action Campaign, representing users of the public healthcare system in South Africa, and Sonke Gender Justice, working on issues of gender equality. Both organisations raised arguments in support of certification of the class action by the mineworkers. An affidavit by Dean Peacock, the executive director of Sonke Gender Justice, was admitted as additional evidence in the case. Peacock's evidence concerned the 'gendered implications of occupational lung disease' focusing on the 'disproportionate care burden carried by women' (Peacock, 2016: para 10).<sup>v</sup> The major argument that emerged from his evidence is that ill mineworkers are primarily dependent on home and community-based care which is largely provided by women and girls due to the lack of access to state provided compensation, social security and medical care. Referring to the literature on the impact of care in the context of HIV/AIDS in South

Africa he detailed some of the effects on the carers' minds, bodies and finances. The Court accepted the evidence of the *amici curiae* that ill mineworkers in rural areas depended on 'home-based care' provided by wives and daughters (at para 214). It noted the following impact of the provision of this care (at para 214):

The care-work is demanding and includes efforts such as carrying, lifting and bathing the mineworkers, monitoring their medication, and staying up at night to attend to their needs. These women, and in some cases girls, are often anxious about the physical deterioration of their loved ones, the mineworkers, and as a result "have reported experiencing tearfulness, nightmares, insomnia, worry, anxiety, fear, despair and despondency, ... trauma ... headaches, body aches and physical exhaustion." In short, they too bear a heavy burden as a result of the mineworkers contracting silicosis and TB. Often, the care work requires full-time attention, effectively compelling many women and girls to forego income-generating, educational, and other opportunities.<sup>vi</sup>

The Court noted that general damages would benefit these carers by reducing their care-work and would 'indirectly compensate them for the care-work they have already provided' (at para 214). Based on these arguments the Court found that the common law had to be developed to allow for general damages claims to be transmitted to the estate of a deceased plaintiff who dies prior to *litis contestatio*, and ordered that the date of the launch of the application for certification, August 2012, be regarded as the date on which claims by members of the class would be transmissible (at para 230(8)).

Aside from the import of the decision in overturning a long-standing legal rule, the judgment is highly significant in recognising the issue of unpaid care work in the law of delict. This significance is two-fold. First, the judgment gives attention to the many dimensions of caring and the varied impacts of this work on the carer. In so doing it acknowledges these tasks as work and their impacts as harms, both of which are unusual in law which tends to overlook unpaid caring work. Second, the judgment attempts to compensate the carers for the harms they have suffered. It is notable that the judges refer to 'indirect compensation' for this work. Is this compensation by stealth, through the legal back door that is normally closed to carers? The law does not usually allow carers to bring damages claims for their unpaid caring work which is treated as gratuitous. This article argues that while the judges in *Nkala* attempted to develop the law some way towards addressing the unfair position of carers, within the constraints of what they felt was possible, this does not take the law far enough. It suggests that unpaid caring work and the depletion that arises from it should be fully compensated directly to the dependent carer.

The article now looks at the first issue raised by the judgment – the nature of unpaid care, its impact on the carer and how to understand and measure it for the purpose of compensating it in law.

### **Unpaid care and depleted carers – Measuring uncounted work**

This section aims not only to highlight the harmful effects of the mining practices on the lives of the miners and those connected to them, but also to disaggregate what human life means in the law. Although the court recognised the contribution that women make to caring for the miners, and to the deleterious effects of this work, like much of the law, globally, it did not recognise the value of domestic labour as labour with value. This is largely because domestic work is placed outside the 'production boundary' and is not seen to be contributing to the national GDP and therefore to the national economy.

Much has been written about the importance of this anomaly – of excluding most of the work within the home as unproductive labour – and its harmful effects (Waring, 1988; Picchio, 1992; Fraser, 2017; Hoskyns and Rai, 2007). This literature challenges not only the domination of the market – what counts is what can be commodified and exchanged – but also of gendered relations that reflect the (public) world of men but not the (private) world of women’s labour. While Marx and Polanyi see the effects of commodification of the first count (the market) as the source of instability and eventual crisis of the economy, feminists have argued that there is a simultaneous crisis of reproduction that has its roots in the denial of the place of social reproduction in the economy and its commodification through the market (Fraser, 2017; Elson, 2000). Fraser has argued that social protection, in Polanyian terms, is being undermined within state policy structures and this in turn is affecting the boundaries of social reproduction as well as the development of human capabilities (2011). Feminist economists have also argued that the restructuring of states and markets is leading to a situation where the subsidy provided by social reproduction is being increasingly relied upon to fill the gaps in the state provision of welfare (Folbre, 2001; Elson, 2000; Pearson 1998). Rai et al (2014) argue that in order to identify the extent to which this is harmful we need to measure the costs of social reproduction, which they term depletion through social reproduction (hereafter referred to as ‘depletion’).

In this article, we think about social reproduction as both “the fleshy, messy, and indeterminate stuff of everyday life” and “also a set of structured practices that unfold in dialectical relation with production, with which it is mutually constitutive and in tension” (Katz, 2001: 710). These practices include: 1) biological reproduction (including reproducing labour). This carries with it the provision of the sexual, emotional and affective services that are required to maintain family and intimate relationships; 2) unpaid production in the home of both goods and services. This includes different forms of care, social provisioning through unpaid work in subsistence farming, family business as well as voluntary work directed at meeting needs in and of the community; and, 3) the reproduction of culture and ideology which stabilises (and sometimes challenges) dominant social relations (Hoskyns and Rai, 2007:). Rai et al define depletion through social reproduction as ‘the level at which the resource outflows exceed resource inflows in carrying out social reproductive work over a threshold of sustainability, making it harmful for those engaged in this unvalued work’ (2014:3-4). The harm through depletion is experienced not only by individuals involved in this work (to their health, both physical and mental, and to their sense of self as well as to their entitlements), but also to the fabric of the household and those who inhabit it (in terms of the decrease in collective household resources: including lack of leisure time spent together, failure to manage the consequences of an increase in the number of household members engaged in wage labour and reduced support structures), and to the communities within which households and individuals live their lives (which would include the shrinking of spaces for community organisation as a result of a lack of time commitments from those mobilized into paid work, a depletion of neighbourliness and of possibilities of collective provisioning). Depletion through social reproductive work then continues to leach out from the labouring bodies, households and communities, unrecognised, unmapped and unvalued and results in harm to those engaged in this work. If unrecognized, depletion erodes individual lives as well as social institutions (family, community groups and resources), which produces a crisis in society. Harm occurs when there is a ‘measurable deterioration in the health and well-being of individuals and the sustainability of households and communities’ (Rai et al 2014:6), and when the inflows required to sustain social reproduction fall below a sustainable threshold. In this context, despite social reproductive work being carried out within consensual social relations, the doing of this work may still remain harmful. Analysing depletion involves identifying indicators and forms of measurement as well as developing an appropriate terminology. Issues to do with

harm and subsidy are relevant here as well as questions about the point at which depletion needs to be recognized, accounted for and how in the end it can be reversed. We also need to understand the scale of depletion and the rate at which it takes place. This would allow us to understand and think through issues of compensation for depletion for the miners and their families.

The concept of depletion is valuable in understanding the everyday political economy. It is not just useful for examining how depletion follows the reduction of state provided services due to economic crises but also aids in understanding the political economy of work and care in the global South (Hassim, 2008; Hassim and Razavi, 2007; Razavi, 2006). It is particularly helpful in understanding care in the context of the South African mining industry and the State's role in legislating for enforced, racialised, rural reproduction of labour in conditions of poverty. Elson has focused on the depletion of human capabilities in the context of economic crisis (1995; 1998; 2000), while Rai et al build their theory on an analysis of everyday political economy, which extends to include not only the public and the private sectors of the economy but also the domestic sectors of the economy; which focuses not on state/market relations alone but also on how the domestic sphere shapes and is shaped by these relations.

Hassim and Razavi have also argued that most social policy innovations in the global north look to reshaping the male bread winner model of employment – to address the issue of increasing mobilisation of women into the labour market, conditions of work, taxation and provision of care services by the state. However, they argue that informal work still forms a critical part of the labour landscape in countries of the global south, such as South Africa, and that this requires a different approach to provision of care, social policy and the work of women (2006). Without this, they argue, 'job security and work-related benefits [remain] privileges available to a relatively thin stratum of workers, predominantly men' (Razavi, 2006:4). As we will see below, this is exactly what we are faced with in the case of miners who have been retrenched – they remain the focus of compensation battles while their carers are overlooked. The focus on the everyday labouring body in the domestic sphere that the depletion framework provides is important, we believe, because this everyday depletion leaves few resources for the poorest and the most vulnerable with which to negotiate and weather crises of social reproduction, particularly in times of economic and social distress.

We now discuss the issues of social reproduction, depletion and compensation through Thom Pierce's beautiful photo essay, *The Price of Gold*, which illustrates the impact of illness on the lives of the miners, widows, other carers and their households. The powerful pictures display the sadness, physical vulnerability and poverty of the miners and their families.<sup>vii</sup>

### **Seeing is Believing? The 'Price of Gold' and Visual Cultures of Depletion**

Alpers et al have argued that an image 'is at least potentially a site of resistance and recalcitrance, of the irreducibly particular, and of the subversively strange and pleasurable' (1996:28). In other words, images have the potential to 'do', in the Austinian sense, just by being seen. A critical photographer is not simply a recorder of what is being done but, as David Goldblatt put it, is a 'witness'. He explained that, 'if I had to report on my activities to a Heavenly Labour Ministry, I would, under the heading of Job Description, say that I am a self-appointed observer and critic of the society into which I was born, with a tendency to doing honour or giving recognition to what is often overlooked or unseen' (2005:94). Pierce is clearly a critical photographer – his photographs do not make icons of the miners as, for example, the work of Margaret Bourke-White did.<sup>viii</sup> Through the photo essay Pierce has been able to walk the fine line between exposing the 'collapse' of the worlds of the retrenched and sick miners and their families, and displaying their courage and dignity in the face of



such adverse circumstances. Pierce's photographs are striking in what they say and what they omit, what they make visible and what remains invisible. He supplements some of these gaps with captions containing information he has selected about each of the miners. As Squires has pointed out:

The photographs are read through a spectrum of texts, including photographer' interviews and writings, news reportage, political and social history...the history of photography... [T]he images can be opened out into a broader field of understanding by texts that can help us comprehend the complexity of what the photographers confronted. (2006:10)

We have chosen to unearth one of the less visible themes that serve as a background to the photographs – the role of women as carers and as bearers of the burdens of social reproductive work. Without claiming expertise as visual researchers, our analysis of these photographs builds on a critical approach to visual culture, which in Gillian Rose's words means that we take 'images seriously', ...think 'about the social conditions and effects of visual objects'...and consider our 'own way of looking at images' (2012:16-17). This means that 'Looking carefully at images, then, entails, among other things, thinking about how they offer very particular visions of social categories such as class, gender, race, sexuality, able-bodiedness, and so on' (Rose, 2012:12). Critical visual studies have, with Berger, worried about images in which '*men act and women appear*' (1972:47).

The social construction of illness – of silicosis acquired by black, male bodies by working in white owned mines – frames the social context of these photographs. Pierce aims to alert the audience to the pain and loss that these photographs reveal and to support the legal claims of the miners and their families. Pierce gives attention both to the male workers and, in some cases, to their relatives: both groups are clearly affected by the men's illness and loss of employment. The photographs speak to the issue of gendered roles and to gendered recognition of individual selves – in most photographs the description is of male lives, even when female bodies are present in the same frame. There are women in kitchens, situated in their homes with the accoutrements of everyday life, their dwellings showing wear and tear but also careful maintenance (Photos 1 and 3 ABOUT HERE). In some images, women are present as an absence where women are working to support the family, sometimes far away from the home. Xolisile Butu's wife works 'in Komani and earns the money for the household – she only comes home once a month' (Photo 6 ABOUT HERE). In another case, retrenched miner Mthuthuzeli Mtshange is seen working as a gardener hundreds of kilometres from home to earn enough to support his 8 children who are presumably being cared for by his wife or other relatives (Photo 4 ABOUT HERE). Women are not portrayed as secondary to the men but as subjects who suffer the effects of poverty – most often they sit rather than stand, as if weighed down by the burden of care, shaped by their relationships with ill men. We are able to deduce that these women are responsible for providing care in the face of poverty, sickness and death (Photo 2 and 3 ABOUT HERE). In this context, the depletion of the individual is easily imagined - the long days, combining caring for the husband, children, grandchildren and the home following his illness and retrenchment.

Depletion can be physical – as measured by the Body Mass Index (BMI), tiredness, exhaustion, sleeplessness (or less sleep than needed for replenishment), health, clothing, heating, and access to clean water, etc (Rai et al, 2014). It can also be mental – the undermining of the self; feelings of guilt and apprehension; and insufficient time for oneself, the enjoyment of family and friendships, and to participate in community life. All these factors can, if they fall below the threshold of normal wear and tear, deteriorate the well-being outcomes, and reduce the capability of the individual to carry out social reproduction in the long run. In certain circumstances they can even lead to increased morbidity (Rai et al, 2014:5). The tiredness and anxiety on the face of the widow of a miner,

Zwelakhe Dala, who passed away in 2015 is clearly evident (Pierce: Photo 5). She told Pierce, 'It is too painful. If my husband was not working on the mines, he would still be alive'. 'Mrs Dala', writes Pierce, 'raised their five children on her own, for the most part. She is now left with no income except for a small pension' (Photo 5 ABOUT HERE).

Ledwaba and Sediki write of the miner's aspirations, 'When they left home, usually as 18-year-olds...they harboured dreams of earning good money on the mines to help them fulfil their dreams of building grand homes for their families...Instead...they come back broke and broken' (2016, xi-ii; see Photo 4). It is not only the miners that are broke and broken - their homes are too. Mncedisi Dlisani (Photo 7 ABOUT HERE), shown in this picture with his family in his ruined house, worked on the mines for 15 years. After being diagnosed with TB he had to leave work and spend 9 months in hospital. It is not only poverty that we witness in this portrait of deprivation, but also the crumbling of the very fabric of homestead. Pierce notes that due to bad weather and poor building materials the walls of their main house collapsed and he has no money to repair it and that he now lives with his family in a rondavel (mud hut). Whilst issues of compensation mean that the money for repair of the house is a critical concern, it is also important to reflect upon issues of labour – if Dlisani is ill, if his wife is looking after him and doing other social reproductive labour in bringing up their family, then who is looking after the repairs of the house? How can the space of the home not suffer? And how can she properly care for him in these physical conditions? As we have seen above, depletion of households is reflected in a decrease in collective household resources, which then adversely affects 'the rate of repair of household infrastructure, including enough disposable income to carry out essential repairs to the fabric of the house, improving the environment of the house to support the members of the household...' (Rai et al., 2014:5). Depletion of the household could also be influenced by intangible factors such as the adverse effects of poverty and ruination on the standing of the household in the community.

Looking at compensation claims in the mining class action using the lens of photography enables us to think about depletion and about which harms are recognized and which ones are not, and the reasons for this. It also leads us to ask who is compensated for which of the harms done to them? And who is not? And what effects does the denial of compensation for this depletion have on the lives of individuals, households and communities? Understanding depletion as it manifests itself in the photographs points to the need for a deep and textured reconsideration of ideas of loss and injury as they are normally understood and quantified for the purpose of compensatory damages in law.

The article now turns to the second issue arising from the *Nkala* case - the legal recognition of caring labour as a loss deserving of damages.

### **Caring, depletion and harm: issues for compensation**

This section sets out the current state of the law in South Africa relating to compensation for unpaid care. It then considers feminist critiques of tort law to expose the problems with existing legal formulations. It goes on to consider feminist legal responses to international law that propose new approaches to harm in law. Drawing on these it argues for the broadening of legal definitions of harm that should include recognition and compensation of social reproduction and the depletion that may arise from this.

The South African law of delict (tort) has its roots in Roman-Dutch law which recognised that 'members of the family of the deceased had a right to enforce a claim for the loss of ... support resulting from the death of the deceased (or injury to him) caused by the unlawful acts of the

defendant' (*Amod v Multilateral Motor Vehicle Accidents Fund*, 1999: para 8). As noted above, dependent's actions are for patrimonial losses only (special damages) and do not include claims for general damages based on the reasoning that the injury is suffered by the breadwinner rather than the dependent. The law aims to put dependents in the same financial position in which they would have been had the breadwinner lived – to compensate their 'out of pocket losses' (van der Walt and Midgely, 2016: 309, para 197, fn 1). Within this broad principle, the courts have had to determine certain issues including who counts as a dependent and what constitutes a dependent's patrimonial loss.

The basis of the dependent's action is the existence of a legal duty of support (*Amod*, para 12). The dependent's action has been extended over many years to a range of situations not contemplated by the old authorities by elaborating on the categories of people regarded as dependents entitled to support in law. Wives and dependent children have always been entitled to claim loss of support where a male breadwinner was killed or injured and hence prevented from supporting them.<sup>ix</sup> A century ago the court in *Union Government v Warneke* (1911: 665) extended this rule to apply to a husband claiming loss of support following the unlawful killing of his wife. Although the man did not depend on her income he counted on her looking after his seven children. Her death meant that he would now incur financial loss in paying for their care. The law effectively acknowledged the need to compensate a man for the 'replacement costs' of a wife, who had provided unpaid caring functions rather than financial support, as a valid form of the dependent's action.

But this acknowledgement of unpaid care work by the law has not translated into compensating women who provide such care work to their injured partners. Since a damages claim rests with the injured man, only he can be compensated for his loss. Were he to pay for care services these would be covered by his damages claim; but his ability to rely on unpaid care services from family members means he does not suffer monetary loss and these services are thus non-compensable. The family members, through their 'voluntary' assumption of caring responsibility, carry the physical, financial and emotional costs of this work, even where they give up paid work to perform this function (Feldman, 1994: 300). They are merely entitled to be maintained by him as they were before his accident but this maintenance obligation remains with him and for him to pursue as part of his own claim for lost income.<sup>x</sup> Should a breadwinner die, the dependents are then able to claim in their own right for the loss of support they would have received had the man survived and provided for them.<sup>xi</sup> It is this unsatisfactory state of the law that led the *Nkala* court to consider ways of allowing the dependents to access the general damages that were meant for the mineworkers. This indirect approach was needed because these women have no actual claim to compensation from the mining houses for their caring labour. (The court did not address the question of who counts as a family member and a dependent. Many of the mineworkers were cared for by urban 'girlfriends' or second wives while working on the mines and left these families to return to their rural families. It is possible that both families provided care during the mineworker's illness, before and after his dismissal from work; and both families were likely to have been dependent on his income).

Feminist legal scholars have, for decades now, raised a number of critical concerns with the law of delict/tort (Conaghan, 2003; Richardson and Rackley, 2012; Chamallas and Wriggins, 2010; Graycar, 1997; 2002), including in South Africa (Feldman, 1994; O'Sullivan, 1992; Albertyn, Fedler and Goldblatt, 1997; Goldblatt and Mills, 2000). A broader feminist critique of law is that it is not only reflective of the social context in which it is located but also creates and maintains power inequalities (Smart, 1989). Judges are informed by their own race, class and gender positions, assumptions and biases based on their particular life experiences. Thus law, including tort law, while formally gender-neutral, tends to view the subject of law as male, usually white and able-bodied.

Where women do make an appearance they are often squeezed into legal or social categories such as 'the good wife', the 'bad mother' and similar unhelpful stereotypes (Graycar and Morgan, 2002). A common assumption in tort law is that wives and other family members (usually women) will assume responsibility for the care of injured men. It is also assumed that women take on these responsibilities through the exercise of empowered, rather than constrained, choice. Feminist scholars have pointed to the consistent devaluation of women's work, in their capacity both as victims of harm and as dependents (Graycar and Morgan, 2002; Feldman, 1994). They have noted that women's unpaid work in the home is frequently discounted in damages awards, unless their male partners suffer financially as a result of this lost labour (Graycar, 2012). The approach taken in South African law to disregard unpaid caring work has been evident in other common law jurisdictions.<sup>xii</sup>

The feminist critiques of tort law also assist in understanding why the complexities of caring work and the depletion that may result from it are often absent in the law. Joanne Conaghan points to the difficulty tort law faces in dealing with the relational nature of harm, emotions and intimacy (2003: 192). Thus, physical harm that results in economic loss is the easiest area for tort law to address. It becomes less helpful in being able to appreciate the impact of harm on family members particularly where they experience 'mere grief' (Conaghan, 2003: 192; Prialux, 2012). As has been noted, it also struggles to deal with the knock-on effects of such harms on the family members of the injured person, including those that result from the caring responsibilities they are forced to assume. The focus on market-based relations in tort law leads to a 'vigorous ... eschew(ing)' of intimacy in favour of a male notion of autonomy (Conaghan, 2003: 192). Tort law aims to define the boundaries of personal freedom and 'limited responsibility for others' that contrasts with ideas of relational interdependence (Conaghan, 2003: 199-200).<sup>xiii</sup> Paradoxically, tort law is focused on duties of care that people owe to each other yet it avoids acknowledging some of the key relationships that underpin this care in determining the legal scope of such duties (Steele, 2012). A further feminist concern with tort law is that it focuses on individual rather than collective responsibility for harm. As Conaghan notes, 'the focus of tort on individual responsibility in the context of injury and harm sits somewhat at odds with more progressive articulations of social or collective responsibility for misfortune' (Conaghan, 2012: viii). This has particular resonance in the case of the miners who must pursue damages claims, albeit as a class, against the mining houses but not against the state that was complicit in the harmful treatment of black mine workers in South Africa.

Feminist legal work in international law and in the context of post-conflict transition has also challenged traditional legal conceptions of harm and compensation. These are critiqued as ungendered and individualized; and where gendered frames have been adopted, this has largely been in the context of sexual violence rather than socio-economic violence (Sankey, 2015; Ni Aolain, 2010). This focus on the socio-economic impact of conflict has some parallels with the depletion argument in this article. While their arguments relate to the context of conflict, our arguments refer to a comparable crisis - the context of ill mine workers returning home that generates the depletion of their carers, households and communities.

In the context of armed conflict, Diana Sankey has alerted us to 'subsistence harms' - deprivations of subsistence needs as a discrete form of violence (Sankey, 2014). Like depletion, these socio-economic deprivations can be seen as structural harms and as a gendered form of violence that is underpinned by gendered roles and inequalities that harm women more than men. Other legal scholars have argued that these socio-economic harms are cumulative and 'social location plays a role in determining the incidence and distribution of particular harms' (Conaghan, 2002: 322). The violent disruption of life can lead not only to erosion of well-being, but also to the narrowing of the

coping strategies available to women. Resilience therefore is not a given. The non-recognition of harm can lead to disruption of households and communities as the individuals affected, both physically and mentally, lose capacity to cope (Ni Aolain, 2010). Further, Ni Aolain argues that 'individual violations create communities of harm which include not only the victim herself but also those people who are closely tied to her emotionally, or who are in a relationship of co-dependency with her' (2010:219). This resonates with depletion which sees harm taking many forms – material and non-material, subsistence, discursive, emotional and citizenship harms. The lack of recognition of these harms erodes the capabilities of women to cope emotionally (PTSD, depression). It challenges their place in society and their right to frame claims against the state as entitlements rather than as the needs of subjects requiring rescue (Rai et al, 2014).

The amicus arguments in the *Nkala* case challenge current legal frameworks to address the contributions and costs of social reproductive work by the families of the mine workers. They aim to advance the law more generally towards recognition of the intimate, gendered work of care and its effects that has historically been rendered invisible and devalued in the cases. This article has suggested that the concept of depletion would give greater conceptual depth to the notion of harm occasioned by caring for the ill mine workers.

In their development of the concept, Rai et al outline three ways of reversing depletion: mitigation, replenishment and transformation (2014:13-15). While theorised separately, this is of course a heuristic device to focus on different aspects of reversing depletion. So, for example, replenishment through increased welfare provision through monetary credit (rather than direct provisioning of health etc) may result in buying in (mitigation) more care rather than shifting the gendered patterns of care responsibility. However, considering them separately does allow us to explore the distinct elements of different strategies for reversing depletion. Within the depletion framework, the strategy of *mitigation* allows individuals engaged in social reproductive work to lean on monetary buy-in of labour or on relational labour (family members, friends, neighbours). This can, however, lead to passing on the costs of depletion to these others – a depletion-chain in effect. In terms of *transformation*, they argue that depletion would be reversed where society fully values unpaid domestic labour and gender relations are equalised. However, it is *replenishment* that seems to speak best to the miners' case as this occurs where 'states or private bodies contribute to inflows' (2014: 14). It includes interventions by both state and voluntary associations and other non-state actors to change policy or the law. In the miners' case, compensation would contribute to inflows to offset depletion. The argument here is that the state has a role to play in developing policies that address the harm attendant upon depletion. Non-state actors like Sonke also play a role in campaigning for legal change whether through legislation or the courts. The opening up of the compensatory regime to enable not just the miners affected by silicosis and TB to be compensated for their loss of income, livelihood and aspirations but also those affected by these illnesses as carers could serve as a bridge between the replenishment strategy (compensation) and transformation strategy (acknowledging depletion as harm and providing the basis of valuing social reproduction).

## Conclusion

By reading Thom Pierce's photographs through feminist legal and political economy perspectives, we have argued that compensation for miners in the silicosis case in South Africa can be better framed by employing the depletion through social reproduction theory. This would allow the law to be more responsive to the gender relations of care of the miners. It would ensure that compensatory responses would take fuller account of the individual miners' social context by seeing them as situated within relationships, families and communities. In this way, compensation would need to be

broadened to include not only the cost of marketised care (medicine, food, etc) but also the cost of depletion through social reproductive work by the families, households and communities.

This approach requires a two-fold response. First, reform of tort law is needed to recognise and compensate unpaid care work and the depletion that results from this. Care work, in the context of extreme poverty and lack of services in rural South Africa, and the harm this caused family members, was arguably foreseeable and sufficiently related to the miners' illnesses not to be considered remote. Carers would need to be allowed to make claims in their own right rather than as indirect recipients of damages just as dependents are able to do in a claim for lost support. However, quantifying the costs of this care is not necessarily straightforward. If comparable care services in the market are used as the measure, then payments may be small because the market tends to undervalue care work which is feminised and poorly remunerated (Brooks, 2005). In addition, if women are compensated for the lost opportunities to work but these opportunities are very limited and low paid for unskilled, Black women in rural areas in South Africa, then again, payments are likely to be very small. Compensating caring work even on a more generous measure that takes account of this context would not address the broader costs of depletion to the carer. In relation to the costs of depletion, lost opportunities to participate in communities and for rest and leisure for example, would also pose challenges for quantification. Any reform of the law in this area would need to generate creative and appropriate measures of the costs of care and depletion of the carer. The second response to addressing depletion, particularly in cases where there has been widespread and systemic harm, is through reparatory schemes. These, involving private actors and/or the state, could use similar innovative mechanisms for quantifying depletion as developed in tort law reform. In addition, they could provide more community-oriented responses such as infrastructure projects that create employment opportunities, educational scholarships and so on, designed to remedy the broader harms caused to communities by practices such as hazardous gold mining. The arguments advanced in this paper for the recognition of care and depletion could inform any settlement scheme that may arise from the class action litigation in the silicosis case. This would be of value to the miners and their families and would also stand as a valuable precedent for similar compensatory schemes in other countries and contexts.

The growing concerns with the issue of unpaid care are being expressed at the international level. The recent UN Commission on the Status of Women stressed 'the need to recognize, reduce and redistribute the disproportionate share of unpaid care and domestic work by promoting the equal sharing of responsibilities between women and men and by prioritizing, inter alia, social protection policies and infrastructure development' (CSW61 Agreed Conclusions (E/CN.6/2017/L.5) at para 30). The recognition of unpaid care has also been articulated in human rights terms. A report of the United Nations' Special Rapporteur on extreme poverty and human rights argued that heavy and unequal care responsibilities are a major barrier to gender equality and to women's equal enjoyment of human rights, and, in many cases, condemn women to poverty (2013). Therefore, the failure of States to adequately provide, fund, support and regulate care contradicts their human rights commitments by creating and exacerbating inequalities and threatening women's enjoyment of their rights. Ideas of depletion of social reproduction should also inform the development of international law in responding to gendered harms. South Africa's strong constitutional framework which requires the common law to be developed in line with constitutional values and rights could lead to greater recognition of care in law. This too might serve as an example to other jurisdictions and also inform the development of international law.

Several countries have supported Household Satellite Accounts that sit alongside the GDP calculations and demonstrate the value of unpaid domestic work, the latest being the UK in 2016.

Feminist economists have also developed statistical models, methodologies such as time-use surveys to calculate the value of this work. The missing link is the political will to standardise inclusion of this work into country GDPs, forcing them to acknowledge the value of women's labour to the economy – and therefore, to compensate both individual miners who are suffering from the collapse of their everyday economies with retrenchment because of illness as well as the carers who look(ed) after the ill miners. This momentum to recognise social reproductive work, is of course stymied by the instabilities of capitalism's crises, leading many to ask whether capitalism needs the 'reserve army' of unpaid labour; whether it is impossible for it to recognise and compensate for social reproductive work (Rai et al 2014). While acknowledging the small spaces for feminist intervention in developing the law, the *Nkala* decision, although insufficiently far-reaching, provides an opportunity to rethink care in law, to extend law effectively into the intimate spaces of the home, and to compensate the invisible work that supports the world.

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### End Notes

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<sup>i</sup> Over a period of 20 days in September and October 2015, Thom Pierce travelled around South Africa's Eastern Cape, into Lesotho and up to Johannesburg to find and photograph the 56 miners and widows named in the court documents. This project was supported by the Treatment Action Campaign and Section 27, organisations working on the right to health in South Africa. The Price of Gold series can be viewed in full at <http://thompierce.com/tpog/>. We are grateful to Thom Pierce for allowing us to reproduce some of these photographs which are labelled here with the name of the applicant in the case (the miner or surviving dependent).

<sup>ii</sup> In September 2016, the Supreme Court of Appeal granted the mining houses leave to appeal against the decision. The appeal has been set down for March 2018. As the lawyers for the mineworkers point out, the appeal and any delay it causes to the resolution of this case is hugely problematic since significant numbers of plaintiffs are dying each year (Chisholm and Lépez 2017, citing attorney Richard Spoor). Parallel to the appeal process there are discussions occurring between some of the parties regarding a possible settlement. For a detailed discussion of the settlement efforts and appeal process see Pete Lewis 'Silicosis: unpacking the gold mines' strategy' GroundUp, 27 March 2017

< <http://www.groundup.org.za/article/silicosis-unpacking-gold-mines-strategy/> >.

<sup>iii</sup> This history was discussed in a supporting affidavit by Professor Francis Wilson, signed 10 December 2014, in the application for admission as *amici curiae* of Treatment Action Campaign and Sonke Gender Justice, *In re: the matter between Bongani Nkala and Fifty-Five Others and Harmony Gold Mining Company Limited and Thirty-One Others*, High Court of South Africa, Gauteng Local Division, Case no: 48226/12. Wilson is a recognized expert on the history of the mining industry, labour migration and poverty in South Africa.

<sup>iv</sup> Windell J's minority judgment found that the development of the common law should apply only in cases concerning a class action.

<sup>v</sup> Affidavit of Dean Peacock, signed 11 December 2014, in the application for admission as *amici curiae* of Treatment Action Campaign and Sonke Gender Justice, *In re: the matter between Bongani Nkala and Fifty-Five Others and Harmony Gold Mining Company Limited and Thirty-One Others*, High Court of South Africa, Gauteng Local Division, Case no: 48226/12.

<sup>vi</sup> Note that the judgment is quoting Peacock's affidavit, above note v, who is quoting Akintola, 2006.

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<sup>vii</sup> The exhibition for this body of work was shown at the Iziko Slave Lodge in Cape Town, in collaboration with the Treatment Action Campaign from 1 December 2015 to 31 March 2016. The exhibition was staged in the dark with only the light from a miner's helmet to illuminate the images.

<sup>viii</sup> See <https://bourkewhite.wordpress.com/> Unlike Pierce, Bourke-White was not able to learn the names of the subjects of the photograph of miners.

<sup>ix</sup> Although a range of other partnerships have been recognized as generating dependency relationships only in more recent years, particularly since the new Constitution in 1994. These include: Muslim marriages: *Amod*, (and a critical response to the decision: B Goldblatt (2000) Case Note: '*Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 (4) SA 1319 (SCA)' *South African Journal of Human Rights* 138); same-sex partnerships: *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA); heterosexual permanent life partnerships: *Paixão v Road Accident Fund* 2012 (6) SA 377 (SC A); and an ex-wife: *Naisbitt v Road Accident Fund* (85653/2014) [2015] ZAGPPHC 969 (24 August 2015). Customary marriages have also been included: *Zimnat Insurance Co Ltd v Chawanda* 1991 (2) SA 825 (ZSC).

<sup>x</sup> Corbett and Buchanan (2017) Volume I, Chapter II 'Damages for Bodily Injury, Who may sue, Wife and Children', footnote 36.

<sup>xi</sup> In such cases, women are unlikely to be able to claim the 'replacement costs' of men's non-economic contributions such as caring for children since the law is likely to assume, often correctly so, that this work was done by women.

<sup>xii</sup> The Australian High Court addressed this issue in *Griffiths v Kerkemayer* [1977] 139 CLR 161 but subsequent court decisions and legislation have significantly undermined the decision (Graycar, 2012). For a discussion of the more progressive developments in Canadian law regarding compensation of unpaid work in the home see Brooks (2005).

<sup>xiii</sup> Conaghan (2003, 203-4) draws on Jennifer Nedelsky's work on a feminist conception of relational autonomy.